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LLC f/k/a Dalsa Barbour LLC

The Honorable Karen A. Overstreet

Chapter 11  
Hearing Date: December 6, 2013  
Response Date: November 29, 2013

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re	)	Case No. 13-19746-KAO
CLI HOLDINGS, INC. dba ALYDIAN,	)	
	)	BITVESTMENT PARTNERS LLC'S
Debtor.	)	OBJECTION TO DEBTOR'S MOTION
	)	TO REJECT EXECUTORY
	)	CONTRACTS

COMES NOW Bitvestment Partners LLC f/k/a Dalsa Barbour LLC ("Bitvestment"), by and through its attorneys of record, Charles R. Ekberg, Tereza Simonyan and Lane Powell PC, and Bryan Reyhani and Reyhani Nemirovsky LLP, and submits this objection (the "Objection") in response Debtor's Motion to Reject Executory Contracts (the "Motion"). The Objection is supported by the Declaration of Daniel H. Gallancy (Gallancy Decl.), the Declaration of Bryan I. Reyhani ("Reyhani Decl."), the exhibits attached thereto, and the papers and pleadings filed in this case.

**I. BACKGROUND**

**A. Parties**

Debtor is a Seychelles corporation that conducts business in Washington and Oregon. See Declaration of Peter J. Vessenes in ("Vessenes Decl."), ¶2 (Docket No. 13). Debtor engages in the operation of mining Bitcoins, a virtual currency created and maintained

1 through an Internet peer-to-peer network.<sup>1</sup> The Debtor's two shareholders are CoinLab Inc.  
2 ("CoinLab") and XRAY Holdings Limited ("XRAY"), owning 65 percent and 35 percent  
3 respectively of Debtor's common stock. *See* Statement of Financial Affairs, §21 (Docket No.  
4 11). Debtor's bankruptcy schedules list CoinLab and XRAY as the two largest creditors of  
5 the Debtor's bankruptcy estate (the "Estate"). *See* Schedule F (Docket No. 11).

6 Bitvestment is a New York limited liability company. Bitvestment engages in  
7 Bitcoin-related business and opportunities. *See* NY Secretary of State's Website.<sup>2</sup>  
8 Bitvestment was formerly known as Dalsa Barbour LLC. *Id.* The name change occurred in  
9 2013, with no other changes occurring to the LLC's ownership, capital structure, and  
10 contractual relationships. *Id.*

11 B. The Bitcoin Services Agreement with Bitvestment

12 On or about August 14, 2013, Bitvestment entered into an Amended and Restated  
13 Bitcoin Services Agreement (the "Amended Agreement") with CoinLab, CLI Holdings Inc.  
14 ("CLI Holdings"), Alydian Inc. ("Alydian" or the "Debtor") (Alydian is in actuality the d/b/a  
15 of CLI Holdings), and each of their respective affiliates. Vessenes Decl., ¶10.

16 Under the terms of the Amended Agreement, Bitvestment paid \$75,000 to Debtor and  
17 CoinLab for them to use their "best efforts" and "dedicate 100% of [their] mining output" to  
18 producing Bitcoins for Bitvestment until Bitvestment receives 7,984.006735 Bitcoins.  
19 Bitvestment paid the \$75,000 in December and March of 2012. (A copy of the Amended  
20 Agreement is attached as Exhibit F to Vessenes Decl., Docket No. 13.) The effect of the  
21 contractual requirement that Debtor and CoinLab dedicate 100 percent of their mining output  
22 to producing and delivering Bitcoins to Bitvestment puts Bitvestment **first** in line to receive  
23

24 <sup>1</sup> A more detailed description of Debtor's business is set forth in the attached Gallancy Decl.

25 <sup>2</sup> [http://appext20.dos.ny.gov/corp\\_public/CORPSEARCH.ENTITY\\_INFORMATION?p\\_nameid=4365816&p\\_corpid=4366415&p\\_entity\\_name=%62%69%74%76%65%73%74%6D%65%6E%74&p\\_name\\_type=%41&p\\_search\\_type=%42%45%47%49%4E%53&p\\_srch\\_results\\_page=0](http://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=4365816&p_corpid=4366415&p_entity_name=%62%69%74%76%65%73%74%6D%65%6E%74&p_name_type=%41&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0)  
26

1 any and all Bitcoins mined by Debtor following execution of the Amended Agreement until  
2 it reached the 7,984.006735 Bitcoins contracted for in the Amended Agreement.

3 Debtor and CoinLab breached the Amended Agreement by failing to deliver to  
4 Bitvestment the Bitcoins mined subsequent to the execution of the Amended Agreement.  
5 Gallancy Decl., ¶30-32. Debtor also breached the Amended Agreement by impairing  
6 Bitvestment's contractual audit rights when Debtor changed the address at which Bitcoins  
7 were being mined and failed to disclose that address to Bitvestment. Gallancy Decl., ¶29.

8 C. New York District Court Case

9 On October 29, 2013, Bitvestment filed a lawsuit in the United States District Court  
10 for the Southern District of New York against the Debtor, CoinLab, Peter Vessenes (Debtor's  
11 managing director and the Declarant under the Motion) seeking, among other things, specific  
12 performance for defendants to mine and deliver 7,984.006735 Bitcoins to Bitvestment.  
13 Vessenes Decl., ¶14. On November 5, 2013, the District Court stayed the action as against  
14 the Debtor as a result of the filing of this Chapter 11 bankruptcy case, and entered a  
15 Temporary Restraining Order to compel CoinLab to begin mining and delivery of the  
16 contracted-for Bitcoins to Bitvestment pursuant to the terms of the Amended Agreement.  
17 Reyhani Dec., ¶2. The TRO also confirmed that Bitvestment is first in line to receive any  
18 mined Bitcoins other than those utilized by CoinLab for ordinary course business  
19 expenditures. *Id.* CoinLab failed to deliver any Bitcoins in accordance with the District  
20 Court's order. On November 21, 2013, the District Court issued and orally read into the  
21 record a second TRO ordering that CoinLab hold and retain 7,984.006735 Bitcoins. *Id. at*  
22 ¶3.

23 D. The Debtor's Motion to Reject the Agreement

24 Debtor filed this Chapter 11 case on November 1, 2013 (the "Petition Date") and  
25 promptly filed this Motion to Reject Executory Contracts on November 15, 2013. In its  
26 Motion, the Debtor claims that it should be allowed to reject the Amended Agreement

1 pursuant to 11 U.S.C. §365 because it is an “executory contract” within the meaning of 11  
2 U.S.C. §365.

## 3 II. ARGUMENT

4 Pursuant to 11 U.S.C. §365(a), a debtor may reject any executory contract subject to  
5 the court’s approval. Before deciding whether the Debtor may invoke 11 U.S.C. §365 to  
6 reject an executory contract, the Court must first determine whether the Amended Agreement  
7 is an executory contract within the meaning of 11 U.S.C. §365 as of the Petition Date.

8 While § 365 does not define the term “executory contract,” Ninth Circuit courts have  
9 employed the following standard to determine whether a contract is executory in nature:

10 [An executory contract is] one on which performance is due to some extent on  
11 both sides.... [I]n executory contracts the obligations of both parties are so far  
12 unperformed that the failure of either party to complete performance would  
constitute a material breach and thus excuse the performance of the other.

13 *Marcus & Millichap Inc. v. Munple, Ltd (In re Munple)*, 868 F.2d 1129, 1130 (9th Cir.  
14 1989); *accord Griffel v. Murphy ( In re Wegner)*, 839 F.2d 533, 536 (9th Cir.1988).

15 Thus, in evaluating the executory nature of the Amended Agreement in this case  
16 consistent with the Ninth Circuit standard, the Court must first evaluate the obligations of the  
17 parties to the Amended Agreement, then determine whether, as of the Petition Date,  
18 obligations remained to be performed by both parties such that either party’s failure to  
19 perform its remaining obligations would give rise to a material breach and excuse  
20 performance by the other party. *In re Texscan Corp.*, 976 F.2d 1269, 1272 (9th Cir. 1992).  
21 If either party has “substantially performed” its side of the bargain, such that the party’s  
22 failure to perform further would not excuse performance by the other party, then the contract  
23 is not executory. *Id.*

24 In this case, despite the novelty of the subject matter and the complexity of the  
25 process by which Bitcoins are mined, the Amended Agreement itself is quite simple and  
26 unambiguously establishes that it is not an executory contract and was not one as of the

1 Petition Date. The obligations of the parties are set forth in Sections 2 and 3 of the  
2 Agreement, and provide as follows:

3 **2. Services.** [Debtor and CoinLab] will use best efforts to mine 7,984.006735  
4 Bitcoins on [Bitvestment's] behalf, which, for the avoidance of doubt, will mean  
5 that [Debtor and CoinLab] shall dedicate 100% of its mining output (other than  
6 mining output that is required to satisfy [Debtor and CoinLab's] obligations to  
7 Crystal Island and mining output that is required to meet [Debtor and CoinLab's]  
8 appropriate mining operating expenses and capital expenditures subject (sic) as  
9 approved by all parties)<sup>3</sup> from the date of this Agreement to producing Bitcoin for  
10 [Bitvestment] until such time as [Bitvestment] receives 7,984.006735 Bitcoins  
11 from [Debtor and CoinLab] pursuant to this Agreement. On a weekly basis,  
12 [Debtor and CoinLab] will promptly deliver to [Bitvestment] the Bitcoins ordered  
13 as they are mined by [Debtor and CoinLab]. [Debtor and CoinLab] will deliver to  
14 [Bitvestment] a weekly account of Mined Bitcoins compared with Bitcoins  
15 delivered to [Bitvestment]. [Debtor and CoinLab] will deliver to [Bitvestment]  
16 Mined Bitcoins via the [Debtor and CoinLab] Storage or other methods of deliver  
17 requested by Customer. [Bitvestment] may retain Mined Bitcoins in the [Debtor  
18 and CoinLab] Storage through the Wind Down Period. [Bitvestment] may  
19 perform one or more audits, at [Debtor and CoinLab's] expense, of [Debtor and  
20 CoinLab's] Bitcoin output to confirm that [Bitvestment] is receiving the mining  
21 output as agreed in section 2.

22 **3. Fees.** In exchange for performing Services, [Bitvestment] has paid [Debtor  
23 and CoinLab] a total of \$75,000.00 USD ("Fees"). Each Party will bear its own  
24 taxes as levied under applicable law.

25 There are two key performances here – on Bitvestment's part to pay \$75,000 and on  
26 Debtor's part to mine Bitcoins and transfer 100 percent of such output to Bitvestment  
subsequent to the date of the Amended Agreement. Bitvestment has fully performed the only  
obligation it had under the Amended Agreement by payment of \$75,000 to Debtor.<sup>4</sup>  
Bitvestment has nothing further to perform on its side of the bargain. Debtor is the only  
party to the Amended Agreement with an ongoing obligation, namely to mine and deliver to  
Bitvestment the Bitcoins for which Bitvestment paid.

27 <sup>3</sup> At the time, it was contemplated that Crystal Island would infuse capital into CoinLab and Alydian, and that  
28 Bitvestment's position would be subordinate to Crystal Island. Ultimately, Debtor and CoinLab rejected the  
29 capital from Crystal Island. Thus, the references to Crystal Island in the Amended Agreement are moot and of  
30 no consequence and Bitvestment's first-in-line position remains unsubordinated.

31 <sup>4</sup> Bitvestment provided additional consideration including, but not limited to, due diligence services at the  
32 request of CoinLab and Debtor, but such additional consideration is not relevant for the Court's analysis in  
33 evaluating that Bitvestment fully performed its only obligation under the Amended Agreement.

1 The Debtor's Motion is devoid of any facts, or even a reference to the applicable  
2 language in the Amended Agreement that would support its requested relief. Debtor simply  
3 makes a bald and conclusory statement that the Amended Agreement is an executory contract  
4 under 11 U.S.C. §365 and that it is "one on which performance is due to some extent on both  
5 sides." The omission of any facts or citation to the Amended Agreement cannot be  
6 happenstance because there is no provision in the Amended Agreement that imposes any  
7 additional performance obligation upon Bitvestment that would render the Amended  
8 Agreement an "executory contract" under 11 U.S.C. §365.

9 Because Bitvestment had fully performed its obligation under the Amended  
10 Agreement as of the Petition Date, the Amended Agreement cannot be an executory contract  
11 eligible for rejection under 11 U.S.C. §365(a). Thus, Bitvestment respectfully submits that  
12 the Court should deny Debtor's Motion to Reject the Amended Agreement with Bitvestment.

13 DATED this 29th day of November, 2013.

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